UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 18, 2024

PRAKASH SINHA,	)	
	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	OCAHO Case No. 2020B00064
INFOSYS LIMITED,	)	
	)	
Respondent.	)	
	)	

Appearances: Prakash Sinha, pro se Complainant
Patrick Shen, Esq., for Respondent

ORDER DISMISSING IN PART AND GRANTING IN PART
RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On April 15, 2020, Complainant Prakash Sinha filed a complaint pro se with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant alleged that Respondent Infosys Limited discriminated against him based on his citizenship and national origin in violation of the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), Title 8, United States Code, Section 1324b.

Respondent moved to dismiss the complaint, asserting that OCAHO lacks jurisdiction, that the complaint is untimely, and that Complainant failed to state a claim upon which OCAHO may grant relief. Mot. to Dismiss 1–2. On November 29, 2022, this Court issued an order converting the motion to a motion for summary decision as to the motion to dismiss the Complainant's claims as untimely. *Sinha v. Infosys Limited*, 14 OCAHO no. 1373b (2022).[1] The Court invited

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that

the parties to file materials of evidentiary quality in support of summary decision on this ground. On December 20, 2022, Complainant filed its Response (R's Resp.) and on January 8, 2023, Complainant filed his response (C's Resp.).

On March 1, 2023, the Court stayed the case due to an "unresolved question as to the Court's ability issue a final order in § 1324b cases that address non-administrative questions," citing to *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, 2 n.4 (2021). *Sinha v. Infosys Limited*, 14 OCAHO no. 1373c, 1-2 (2022).

On October 12, 2023, the Department of Justice published an interim final rule providing for review by the Attorney General of OCAHO Administrative Law Judge (ALJ) final orders in cases arising under 8 U.S.C. § 1324b. *See* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68). The regulation resolved the issue identified in *A.S. v. Amazon Web Servs., Inc*. that led to the stay. As a result of this change to the regulation, this Court may proceed to a final case disposition in this matter. Accordingly, the stay is lifted.

For the reasons set forth herein, Respondent's Amended Motion is Dismiss is GRANTED in part and DISMISSED in part.

II. BACKGROUND AND PROCEDURAL HISTORY

On February 12, 2020, Complainant filed a charge against Respondent with the United States Department of Justice, Civil Rights Division's Immigrant and Employee Rights Section (IER), alleging that Respondent discriminated against him based on his citizenship status. IER Charge Form at 1-2. Specifically, Complainant stated that he applied and was interviewed for a position with Respondent many times, but was never selected. *Id.* at 2. He stated that he spent months preparing for each interview and waiting for feedback, but rather than informing him that a position had been filled, Respondent's HR recruiters repeatedly contacted him about similar positions. *Id.* Complainant alleged that Respondent had been filling those positions with H-1B holders, and was merely interviewing Complainant "as a set up to show . . . [the] US Labor Department . . . that [Respondent] also consider[s] US Citizens for those positions." *Id.* at 2-3. Complainant further alleged that an interviewer laughed at him upon learning of Complainant's Veteran status. *Id.* at 3. In his charge, Complainant noted that he also filed a charge against

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volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed on the Westlaw database "FIM-OCAHO," the LexisNexis database "OCAHO," or on OCAHO's homepage on the United States Department of Justice's website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

Respondent with the Equal Employment Opportunity Commission (EEOC) based on the same set of facts on February 4, 2020. *Id.* IER informed Complainant that his submission was incomplete and requested additional information on March 3, 2020. Letter Requesting Information from IER to Prakash Sinha (Mar. 3, 2020). Complainant submitted the requested information on March 11 and March 23, 2020. *See* C's Resp. to Order of Inquiry, Attachment E.

By letter dated April 3, 2020, IER informed Complainant that it was dismissing his submission. Letter of Determination from IER to Prakash Sinha (Apr. 3, 2020). Specifically, IER explained that it had reviewed his charge against Respondent alleging citizenship status discrimination because of a preference for temporary visa holders, but concluded that the submission was untimely because it was not filed within 180 days of the date of the alleged discrimination as required by 8 U.S.C. § 1324b(d)(3) and 28 C.F.R. § 44.300(b). *Id.* IER provided Complainant with information about how to file a complaint with OCAHO, the Court with jurisdiction over his claims, if he thought IER's determination was incorrect. *Id*.

On April 15, 2020, Complainant filed his complaint with OCAHO. Complainant asserts that he applied to be a SAP FICO Analyst for Respondent[2] but that Respondent refused to hire him, despite his qualifications. Compl. at 6.[3] Complainant alleges that he was not hired because Respondent filled the positions with H-1B visa holders, and that Respondent only "tr[ies] to consider/interview people like [Complainant] for various jobs, to show the [L]abor [Department] that [Respondent] practice a fair hiring practise [sic] in giving chance to US citizens." *Id.* at 7.

Due to Respondent's failure to answer the complaint, OCAHO issued a Notice of Entry of Default on July 2, 2020. Respondent did not respond to the Notice of Entry of Default by the deadline of July 17, 2020. Given the record before the Court and Respondent's lack of participation in the case, the Court issued an Order of Inquiry to Complainant on September 15, 2020. *Sinha v. Infosys*, 14 OCAHO no. 1373, 2 (2020). To ascertain subject matter jurisdiction over Complainant's claims, the Court ordered Complainant to provide additional information regarding (a) the number of employees employed by Respondent; (b) the charges he filed against Respondent before the EEOC and the status of that case; and (c) the nature and extent of the alleged discriminatory conduct by Respondent to determine the timeliness of Complainant's filings. *Id.* at 5-6. Complainant responded to the Order on October 20, 2020. *See* C's Resp. to Order of Inq.

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[2] In his original complaint to OCAHO, Complainant indicated that he last applied for work with Respondent on September 30, 2019. Compl. at 6. However, Respondent denied this fact in its answer. Ans. at 2. Indeed, in response to Respondent's answer, Complainant clarified that he did not apply for a position on September 30, 2019, but rather that he meant to use that date as the last date of communication with Respondent. C's Feedback on R's Ans. at 2. Instead, Complainant maintains that he last applied for a position with Respondent on June 19, 2019. C's Resp. to Order of Inq. at 7.

[3] All pincites to the Complaint refer to the pagination of the PDF file, not the internal pagination of the complaint form itself.

On October 27, 2020, counsel for Respondent entered his appearance and, on behalf of his client, filed a Request for Administrative Record and Motion for Enlargement of Time. The Court subsequently ordered Respondent to file by December 11, 2020, both its answer to the complaint and its response to the Notice of Entry of Default, showing good cause as to why it failed to timely file its answer.

On December 10, 2020, Respondent filed its answer to the complaint and response to the Notice of Entry of Default. On December 18, 2020, Complainant filed a document which the Court construed as both (a) a reply to Respondent's answer to the complaint, and (b) a reply to Respondent's response to the Notice of Entry of Default. On January 29, 2021, the Court determined that Respondent established good cause for its untimely answer, ordered the answer accepted, and discharged the Notice of Entry of Default against Respondent. *Sinha v. Infosys*, 14 OCAHO no. 1373a (2021).

On February 23, 2021, Respondent filed a Motion to Dismiss. Complainant filed a Response to Respondent's Motion to Dismiss on May 20, 2021.

On November 29, 2022, this Court issued an order converting the motion to a motion for summary decision as to the motion to dismiss the Complainant's claims as untimely. *Sinha v. Infosys Limited*, 13 OCAHO no. 1373b (2022). The Court invited the parties to file materials of evidentiary quality in support of summary decision on this ground. On December 20, 2022, Complainant filed its Response (R's Resp to Mot to Conv..) and on January 8, 2023, Complainant filed his response (C's Resp. to Mot. to Conv.).

III. SUMMARY OF THE PARTIES' ARGUMENTS

Respondent makes three primary arguments in support of its motion to dismiss. First, it asserts that OCAHO lacks jurisdiction over Complainant's claim of national origin discrimination because OCAHO only has jurisdiction over national origin discrimination claims if the employer has fewer than fifteen employees, 8 U.S.C. § 1324b(a)(2)(B), and Infosys employs more than fifteen people. Mot. to Dismiss at 8. Second, Respondent argues that OCAHO should dismiss the complaint because Complainant failed to timely file his charge of discrimination within the statutorily allotted 180 days after an alleged act of discrimination. *Id.* at 9. Based on Complainant's February 12, 2020, filing date with IER, Respondent calculates the latest date when the discrimination must have occurred for the complaint to be timely as August 16, 2019. *Id.* at 3. Respondent argues that the 180-day period began to accrue on May 27, 2019, the date that Respondent communicated its rejection of Complainant for one of the positions to which he applied. *Id.* at 10. Respondent further argues that Complainant has not identified an event which could be reasonably construed as a discriminatory act after the May 27, 2019 rejection. *Id.* Finally, Respondent argues that OCAHO should dismiss the complaint because Complainant failed to plead enough facts to support a prima facie claim of discrimination. *Id.* at 11. Specifically, Respondent states that Complainant has not pleaded facts with specificity to support his claims, but rather only made generalized assertions, and thus failed to state a claim upon which relief can be granted. *Id.* at 13-14.

In response to the order converting the motion to a motion for summary decision, Respondent submitted two declarations from Joanne Polanowski, Respondent's Manager of Operations for Talent Acquisition in North America, who states that Complainant applied for ten job requisitions, seven of which were cancelled, and of the remaining three, two were filled by United States citizens, and the third was filled by a United States citizen and a H4 EAD card holder. R's Resp. to Mot. to Conv. Att. A&B. Ms. Polanowski states that Complainant last applied for a job on June 19, 2019, and he was not interviewed for the position, which was ultimately cancelled. *Id.* Att. A. Respondent also attached Complainant's submissions to the Notice of Inquiry, and a collection of emails related to Complainant's applications, including the June 19, 2019 position. R's Resp. to Mot. to Conv. Att. C&D.

Complainant responded to each of Respondent's arguments. First, Complainant does not challenge Respondent's argument that OCAHO lacks jurisdiction over the national origin discrimination claim, but rather explains that he did first initiate his complaint in EEOC, and defers to the Court's judgment on the issue. C's Resp. to Mot. to Dismiss at 1-2.

Second, with regard to the issue of timeliness, Complainant cites to several OCAHO cases discussing equitable modification of the 180-day deadline. *Id.* at 2. Specifically, he highlighted a citation to *Tousaint v. Tekwood Assoc.*, 6 OCAHO no. 892, 784, 794 (1996), explaining that equitable modification may be warranted when the complainant can show that "(1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise . . . ." *See id.* at 2. Complainant states that the last video interviews were in the month of June 2019, but Respondent's Technical Recruiters contacted him during July and August 2019 for other similar openings, continuing to give Complainant "hope that he might be called anytime." *Id.* at 3. Complainant alleges that he "was hopeful till the end of 2019 and early 2020 that he would be getting a job offer any minute. . . . In fact, his life was put on hold for a phone call or email notification." *Id.* Complainant further asserts that, apart from the letter of rejection he received on May 23, 2019, he never received notifications informing him that any of the other positions he had applied for had been filled, put on hold, or cancelled. *Id.* at 3-4. Rather, he alleges that the first time he learned about the cancellation of some of the positions was upon reading Respondent's Prehearing Statements on March 31, 2021. *Id.* at 4. In short, Complainant argues that "Respondent's argument that the clock for 180 days starts from June 2019, only holds true, if and only if, the Complainant was properly notified about the job closure . . . in June 2019." *Id.* at 4.

With regard to his demand of $240,000 from Respondent, Complainant maintains that this was his attempt "as an honest human being . . . to close this matter amicably, and move on. . . . This was a minimum amount, and Respondent owed this to Complainant." *Id.* at 5. Complainant further states that he had no choice but to file for bankruptcy in November of 2019, and "completely, [sic] puts the blame on Respondent for driving him to take this action for his and his family's survival." *Id.*

Finally, in response to Respondent's argument that the complaint lacks sufficient information to support a prima facie case of citizenship discrimination, Complainant reiterates some of his earlier arguments about not having been notified about the positions. Complainant further explains that he does not have access to Respondent's HR records, which, he alleges, "are kept private . . . and can be changed or manipulated easily . . . ." *Id.* at 6. Complainant does not believe Respondent's assertions in its Motion with regard to whom it has hired, based on "Respondent's wrongdoings in the past," as manifested by a Google/Bing search showing "hundreds and hundreds of lawsuits against Respondent . . . ." *Id.*

In response to the Notice of Intent to Convert, Complainant reiterates that he did not receive notification of the closure of the job applications and attaches emails, including a notification of a web cam interview on June 19th. C's Resp. to Mot. to conv. Att. A at 7, email conversations with an Infosys employee, *Id.* at 8; Complainant's bankruptcy filing, and a listing of articles regarding lawsuits against Infosys. *Id.* Att. B.

IV. LEGAL STANDARDS

Dismissal of a complaint is appropriate in situations where, *inter alia*, the Court lacks subject-matter jurisdiction, the complaint is time-barred, or the complainant fails to state a claim. *See, e.g.*, *Ruan v. U.S. Navy*, 8 OCAHO no. 1046, 714, 716 (2000) ("[I]t is well established the Fed. R. Civ. P. 12(h)(3), which compels dismissal of actions whenever it appears . . . that the court lacks jurisdiction over the subject matter, may be used as a general guideline when an OCAHO Administrative Law Judge (ALJ) has reason to question OCAHO's subject-matter jurisdiction.") (internal quotation marks and citations omitted); *Hajiani v. Ali Properties, LLC*, 10 OCAHO no. 1188, 7 (2013) (dismissing a complaint as time-barred); 28 C.F.R. § 68.10 (allowing for dismissal when a complainant fails to state a claim upon which relief can be granted). However, the standards governing each issue are distinct and should not be conflated. *See, e.g.*, *Ruan*, 8 OCAHO no. 1046, at 716.

Per OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue of material fact and that the party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of material fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986), and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 284 (1986)). "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." *Hajiani v. ESHA USA, Inc. and Sameer Ramjee*, 10 OCAHO no. 1212, 6 (2014).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United*

States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing." *United States v. 3689 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters.*, 4 OCAHO no. 615, 249, 261 (1994) (citations omitted).

V. DISCUSSION AND ANALYSIS

A. Jurisdiction

OCAHO's subject matter jurisdiction over claims based upon national origin is statutorily limited to claims against employers employing between four and fourteen individuals. *See* 8 U.S.C. §§ 1324b(a)(1)(A); 1324b(a)(2)(A); 1324b(a)(2)(B). Consequently, an individual cannot maintain a national origin claim against an employer in this Court if that employer employs less than four or more than fourteen employees. *See, e.g.*, *Tal v. Energia*, 4 OCAHO no. 705 (1994).

It is undisputed that Respondent employs more than 14 employees. *See* Compl. at 7 (estimating that Respondent employs over 80,000 employees in the United States); Mot. to Dismiss at 8 (requesting OCAHO to take administrative notice that Infosys employs fifteen or more persons in the United States); *see also* Infosys's Annual Report 2020-21 at 35 (2021) (noting that Respondent "had 2,04,396 [sic] employees on standalone basis and 2,59,619 [sic] employees on consolidated basis as of March 31, 2021."). Therefore, since Respondent employs more than fourteen individuals, this Office lacks subject matter jurisdiction over Complainant's claim of discrimination based upon his Indian national origin, *see* 8 § U.S.C. § 1324b(a)(2)(B). Accordingly, that portion of Complainant's April 15, 2020, complaint is DISMISSED.

B. Timeliness of the Complaint of Citizenship Discrimination

Prior to bringing a case before OCAHO under 8 U.S.C. § 1324b, a Complainant alleging immigration-related employment discrimination must file a charge with IER within 180 days of the alleged discrimination. *See* 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); *Dakarapu v. Arvy Tech, Inc.*, 13 OCAHO no. 1308, 2 (2018). "For purposes of triggering the statute of limitations, an employment decision is made and communicated when the aggrieved party receives unequivocal notice of that decision, that is, when the party knew, or reasonably should have known, that the adverse employment decision had been made by the employer." *Walker v. United Airlines*, 4 OCAHO no. 686, 791, 814 (1994); *cf. Sanchez v. Leo Ocanas Farm*, 9 OCAHO no. 1115, 10 (2005) ("the focus of the inquiry for purposes of deciding when a claim accrues, is on the act itself and when the decision was communicated to the applicant"); *Toussaint v. Tekwood Assoc.*, 6 OCAHO no. 892, 784, 793 (1996) ("("[A]n unequivocal notification of . . . rejection of employment delineates the commencement of the limitations period.").

Receipt of a rejection letter is unequivocal notice. *See, e.g.*, *United Airlines*, 4 OCAHO no. 686 at 842 ("I concluded that each complainant received unequivocal notice of her nonselection on the date she received [the respondent's] rejection letter.") (citation omitted). By contrast, when the decision of nonselection is communicated to a complainant by someone other than an authorized agent of the employer, it fails to satisfy the unequivocal notice standard as a matter of law. *See id.* at 844. When an employer fails to inform a complainant that he or she is no longer being considered for the position or fails to advise him or her of the results of the job interview, a complainant may nevertheless be held to have known, or reasonably should have known, that the adverse employment decision had been made. *See, e.g.*, *Bozoghlanian v. Hughes Radar Sys. Group*, 5 OCAHO no. 741, 148, 155 (1995) (concluding that the complainant's filing of a charge was untimely, even though he had never been informed that he was no longer being considered for the position, because "it is simply not reasonable for a job applicant to believe that he is still being considered for a position almost six (6) years after [applying and interviewing for a position].") (alterations in original) (citation and internal quotation marks omitted).

The pertinent question here is whether Complainant received unequivocal notice, knew, or reasonably should have known that Respondent made an adverse employment decision before August 16, 2019, which is 180 days before he filed his charge with IER on February 12, 2020. IER concluded that Complainant's submission was not timely filed, but it did not specify which event or date it relied upon to make such a determination. *See* Letter of Determination from IER to Prakash Sinha (Apr. 3, 2020). Respondent argues that the 180-day statute of limitations began to accrue on May 27, 2019 - 261 days before filing the charge with IER - when Complainant was rejected from one of the positions. Mot. to Dismiss at 3, 10. Respondent further argues that Complainant has not identified an event which could reasonably be construed as a discriminatory act after the May 27, 2019 rejection. *Id.* at 10. Complainant acknowledges receipt of this rejection letter.[4]

Accordingly, the Court finds that Complainant received unequivocal notice of the adverse employment decision with regard to that position, and thus triggered the statute of limitations for when he should have filed a charge with IER. Similarly, after receiving a rejection notice with regard to this position, Complainant should have reasonably known that he was also no longer being considered for the earlier position that he applied for on January 15, 2019. *See* C's Resp. to Order of Inq. 26, Attachment E.[5] Indeed, the fact that Complainant continued to apply for

[4] Complainant first stated that he was notified of his non-selection for a position on May 27, 2019, *see* C's Resp. to Order of Inq. at 26, Attachment E, but later stated that he received the rejection on May 23, 2019, C's Resp. to Mot. to Dismiss at 4. Respondent does not dispute that Complainant was most recently rejected on May 27, 2019. Mot. to Dismiss at 9. Construing the facts in the light most favorable to Complainant, the Court will assume he received the rejection on May 27, 2019. Even so, however, this date is still well beyond the 180-day period.

[5] All pincites to Complainant's Response to the Order of Inquirty refer to the pagination of the PDF file, not the internal pagination of the response itself.

positions after having been rejected[6] suggests that he knew that he was no longer being considered and was not holding out hope. Therefore, the Court finds that all claims of discrimination based on citizenship that occurred on or before May 27, 2019, are untimely and shall be DISMISSED.

Contrary to Respondent's assertion, however, there remains a question as to whether Respondent's refusal to hire Complainant for the positions for which he applied on June 13, 2019, and June 19, 2019, are time-barred. Just as the prior inquiry, this depends on whether Complainant received unequivocal notice, knew, or reasonably should have known that Respondent made an adverse employment decision with regard to those positions. Complainant alleges that he never received notification about any decision. Compl. at 7; C's Resp. to Order of Inq. at 26, Attachment E; C's Resp. to Mot. to Dismiss at 4. Rather, he argues, he "had [his] life on standstill," C's Resp. to Order of Inq. at 26, and "was hopeful till the end of 2019 and early 2020 that he would be getting a job offer any minute. He was ready to start the job any minute. In fact, his life was put on hold for a phone call or email notification." C's Resp. to Mot. to Dismiss at 3.

While it is perhaps reasonable for an applicant to hold out hope for a few months after having been interviewed for a position, the record here indicates that Complainant had lost such hope no later than August 10, 2019, when he sent a letter to Respondent expressing his belief that he was "a victim of fraud and discrimination by INFOSYS." C's Resp. to Order of Inq. at 19, Attachment D.1 ("After being fooled by INFOSYS hundreds of times, I started realizing that all of these were set up as a scam. . . . I believe the company is still following unlawful acts for its purpose and benefit."). Complainant reaffirmed his certainty of discrimination on September 27, 2019. *See id.* at 21, Attachment D.3 ("After some thinking, and discussion with appropriate people, I don't feel confidant [sic] to send you again my resume, as asked by you, which I have done so many times. I stand by my letter. . . and will pursue my actions as explained in the letter."). Further, he stated that Infosys recruiters contacted him on a regular basis, interviewed him, but after each interview "all went dead," he was not contacted and "my life was completely on hold for 2-3 weeks each time on the hope that I got a job." *Id.* at 30, Attachment E.5. Thus, the Court finds that Complainant knew (or at least believed) by August 10, 2019, that Respondent had made an adverse employment decision, and thus should have filed a charge with IER within 180 days of that date—no later than February 6, 2020. Therefore, because Complainant did not file a charge with IER until February 12, 2020, past the 180-day filing period, his remaining claims are likewise untimely.

Rather than a jurisdictional prerequisite, the 180-day time limit is like a statute of limitations, subject to waiver, estoppel, and equitable tolling. *Sabol v. N. Mich. Univ.*, 9 OCAHO no. 1107, 4-5 (2004) (citation omitted). Exceptions allowing for equitable tolling are narrow and Complainant bears the burden to show that relief is warranted. *Dakarapu v. Arvy Tech, Inc.*, 13 OCAHO 1308, 6-7 (2018) (citation omitted). The 180-day filing deadline "is generally extended for periods during which: (1) the employer held out hope of employment or the applicant was not

[6] For the year of 2019, Complainant states that he applied for positions with Infosys on January 15, April 29, May 23, June 13, and June 19. C's Resp. to Order of Inq. at 7, 26, Attachment E.

informed that he was not being considered; (2) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise; or (3) the charging party timely filed his charge in the wrong forum." *Toussaint*, 6 OCAHO no. 892 at 794.

A mistaken yet timely filed charge with EEOC rather than IER may justify equitable tolling of the 180-day period. *See, e.g.*, *Toussaint*, 6 OCAHO no. 892 at 794 (noting that filing a charge with EEOC might have tolled the statute of limitations, but the 180-day period had already expired by the time the complainant had actually filed a charge with EEOC). Here, Complainant filed a complaint with EEOC on February 4, 2020, which would have fallen within the 180-period (as calculated from August 10, 2019) had it been filed to the correct forum. C's Resp. to Order of Inq. at 2-3.

"[T]o prevent any loss of rights arising from the operation of a filing deadline against an individual who mistakenly files with the wrong agency, [[IER] and EEOC have entered into a [MOU]." *Griffin, III, v. all Desert Appliances DBA, ADA Repair, Inc.*, 14 OCAHO no. 1370, 3 (2020), *citing to Caspi v. Trigild Corp.*, 6 OCAHO no. 907, 957, 964 (1997). Under the MOU, IER and the EEOC each appointed the other "to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits." *Toussaint*, 6 OCAHO no. 892 at 794 (quoting MOU, 54 Fed. Reg. 32,499, 32,500 (1989)); *see* MOU, 63 Fed. Reg. 5518, 5519 (Feb. 3, 1998). The MOU ensures "that a charging party will not be penalized for selecting the wrong forum in which to file." *Caspi*, 7 OCAHO no. 991 at 1068; *see also Udala v. New York State Dept of Education*, 4 OCAHO 633, 390, 396 (1994)("Equitable tolling may be invoked in situations where, for example, the subject of discrimination asserted his or her rights in the wrong forum, was actively misled by the employer, or was prevented in some extraordinary way from exercising his or her rights.")

In the complaint filed with the Texas Workforce Commission Civil Rights Division (EEOC Form 5), Complainant checked the boxes for discrimination based on age and national origin, but in the narrative section he stated that "I believe this Company did not hire me because of my age and US Citizenship." C's Resp. to Order of Inq. at 3-4. The EEOC denied the claim based on the merits on February 14, just ten days later, but, according to Complainant, also called him to tell him he should file with DOJ. *Id.* at 5-6. While the EEOC did not technically refer the case to IER as envisioned by the MOU, the narrative makes it clear that Complainant was making a claim, in part, based on citizenship. Complainant filed with IER on February 12, 2020, so no time elapsed between the EEOC case and the IER filing. As it appears that Complainant filed the claim in the wrong forum, and immediately filed with IER upon learning of the error thereby showing due diligence, equitable tolling is warranted. Accordingly, pursuant to the MOU, the Complainant timely filed his claim as to the last two jobs for which he applied on June 13 and June 19, 2019.

Accordingly, Complainant's claims of citizenship discrimination are DISMISSED as time-barred as to any position for which he applied before May 27, 2019, but Respondent's motion to dismiss as to the positions for which Complainant applied in June 2019 are DENIED.

C. Pleading a Claim on Which Relief May Be Granted

The Court may dismiss the complaint based on a motion by the respondent if it determines that the complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. § 68.10(b). "OCAHO's rules require only that the complainant set out facts 'for each violation alleged to have occurred.'" *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016) (quoting *United States v. Split Rail Fence Co.*, 10 OCAHO no. 1181, 5 (2013) (order by the CAHO)). The complainant is not required to plead a prima facie case to overcome a motion to dismiss for failure to state a claim upon which relief can be granted. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002); *Kelly Legal Servs.*, 12 OCAHO no. 1282 at 10. Additionally, complaints of *pro se* complainants "must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel." *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 777 (1992).

On a motion to dismiss, "the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The court may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113-14. Additionally, "a copy of a document attached to a pleading is a part of the pleading for all purposes." *S. v. Discovery Fin. Servs.*, 12 OCAHO no. 1292, 8 (2016), . (citing FED. R. CIV. P. 10(c)). If analysis of the complaint reveals that Complainant can prove no facts in support of his claim that would entitle him to relief, the Court may dismiss for failure to state a claim. *Aguinaldo v. McDonnell Douglas Corp.*, 4 OCAHO 707, 1042, 1047 (1994).

Under Section 1324b, an employer is prohibited from discriminating against a protected individual with respect to hiring based on the protected individual's citizenship status. 8 U.S.C. § 1324b(a)(1). A United States citizen is a "protected individual" under Section 1324b(a)(3)(A).

Jurisdictional and timeliness issues aside, Complainant alleges in his complaint that Respondent discriminated against him because of his U.S. citizenship status by refusing to hire him, despite his qualifications for the position, and instead hiring foreign nationals with H-1B visas. Compl. at 2, 6-7. Contrary to Respondent's assertion, these allegations are not legal conclusions, but rather facts that could be proven or disproven. Accepting these facts as true and in the light most favorable to Complainant, the Court finds that Complainant pleaded sufficient minimal factual allegations within the four corners of his complaint giving rise to an inference of citizenship discrimination under 8 U.S.C. § 1324b. *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016). Whether Complainant can meet his burden of proof establishing these allegations is a separate matter not appropriate for determination on a motion to dismiss, or in this limited motion for summary judgment relating to timely filing.

VI. PREHEARING CONFERENCE

The Court will be setting a telephonic prehearing conference in this matter to address questions, discuss the Settlement Officer Program, and develop the scheduling order. The parties are to advise the Court on their availability for a telephonic prehearing conference on one of the three dates and times listed below:

Tuesday, February 6, 2024, at 3:00 p.m. EST (1:00 pm CST)
Thursday, February 8, 2024, at 11:00 a.m. EST (9:00 a.m. CST)
Monday, February 12, 2024, at 1:00 p.m. EST (11:00 a.m. CST)

The parties are to provide the Court with written submissions that state their availability for the above-listed dates. If the parties are not available on any of the proposed days/times, they may suggest alternative days/times on which they have availability the week of February 6 or February 12.

For the parties information, OCAHO's Settlement Officer Program is described in Chapter 4.7 of the OCAHO Practice Manual.[7] The Settlement Officer Program is a voluntary program through which the parties use a settlement officer to meditate settlement negotiations as a means of alternative dispute resolution. The administrative law judge (ALJ) may refer a case to a settlement officer upon receipt of written confirmation of consent to referral from each party and a determination by the ALJ that the case is appropriate for referral. The parties may request that the Court refer the case to a settlement officer at any time while proceedings are pending, up to thirty days before the date scheduled for a hearing.

If you have any further questions, please feel free to contact chambers at ###-###-####.

VII. CONCLUSION

The Court finds that it does not have jurisdiction to hear Complainant's claims of discrimination based on national origin. The Court also finds that Complainant's claims of discrimination regarding positions for which he applied before May 27, 2019, are time barred, but the claims of discrimination regarding the positions for which he applied in June 2019 were timely filed.

IT IS SO ORDERED that Respondent's Motion to Dismiss is GRANTED in part and DISMISSED in part.

SO ORDERED.

Dated and entered on January 18, 2024.

Honorable Jean C. King
Chief Administrative Law Judge

[7] https://www.justice.gov/eoir/eoir-policy-manual/iv/4/7.